



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 8, 1998

Mr. James G. Nolan
Senior Attorney
Legal Services Division
Texas Workforce Commission
101 E. 15th Street Room 651
Austin, Texas 78748

OR98-1417

Dear Mr. Nolan:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 116145.

The Texas Workforce Commission (the "commission") received a request for information concerning an investigation of sexual harassment. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state or a political subdivision is or may be a party. The governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 (1986) at 4. Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 (1989) at 5 (litigation must be "realistically contemplated").

On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. See Open Records Decision No. 331 (1982). Nor does the mere fact that an individual hires an attorney and alleges damages serve to establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983) at 2. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4. After reviewing your arguments, we conclude that you have not made the requisite showing that litigation is reasonably anticipated. Accordingly, you may not withhold the requested information pursuant to section 552.103.

The Office of the Attorney General, nonetheless, will raise section 552.101 on behalf of a governmental body when necessary to protect third-party interests. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987). Section 552.101 excepts from required public disclosure information that is considered confidential by law, either constitutional, statutory, or by judicial decision. Information may be withheld under section 552.101 in conjunction with the common-law right to privacy (1) if the information contains highly intimate or embarrassing facts about a person's private affairs such that release of the information would be highly objectionable to a reasonable person, and (2) if the information is of no legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

Although information relating to an investigation of a public employee may be embarrassing, the public generally has a legitimate interest in the job performance of public employees. See Open Records Decision Nos. 444 (1986), 405 (1983). In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigatory files in *Ellen* contained individual witness and victim statements, an affidavit by the high-ranking police officer accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Id.*

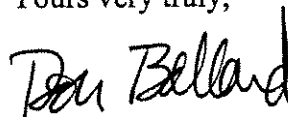
The court held that the names of witnesses and their detailed affidavits regarding allegations of sexual harassment was exactly the kind of information specifically excluded from disclosure under the privacy doctrine as described in *Industrial Foundation*. *Ellen*, *supra*, at 525. However, the court ordered the release of the affidavit of the person under investigation and the summary of the investigation with the identities of the victims and witnesses deleted from the documents, noting that the public interest in the matter was sufficiently served by disclosure of such documents and that in that particular instance "the public [did] not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements." *Id.*

This office feels compelled to follow the *Ellen* decision with regard to victims' and witnesses' identities; we have marked the types of information the commission must withhold to protect the identities of these individuals.¹ Unlike the case in *Ellen*, however, it is not apparent to this office that the commission has released details of the alleged sexual harassment to the public. Consequently, the commission must release all remaining information pertaining to the allegations because of the clear public interest in this information. Cf. Open Records Decision No. 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees).

Finally, we note that some of the submitted information may be protected under section 552.117. Sections 552.024 and 552.117 provide that a current or former public employee or official can opt to keep private his or her home address, home telephone number, social security number, and information that reveals that the individual has family members. You must withhold this information if, as of the time of the request for the information, the named individual had elected to keep this information private. Open Records Decision Nos. 530 (1989) at 5, 482 (1987) at 4, 455 (1987). Also, if the individual's social security number was obtained or maintained by a governmental body pursuant to any provision of law, enacted on or after October 1, 1990, it is confidential pursuant to section 405(c)(2)(C)(viii) of title 42 of the United States Code.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Don Ballard
Assistant Attorney General
Open Records Division

JDB/VDP/RWP/mjc

Ref.: ID# 116145

¹Although the *Ellen* court recognized that the person accused of sexual misconduct may in some instances have a privacy interest in information contained within investigatory files, the public's interest in disclosure of the information generally outweighs the accused's privacy interest. See *Morales v. Ellen*, 840 S.W.2d 519, 525 (Tex. App.--El Paso 1992, writ denied).

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Enclosures: Submitted documents

cc: Ms. Kris Dudley
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(w/o enclosures)